

2006

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Recommended Citation

Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 Fordham L. Rev. 1287 (2006).
Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss3/8>

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Cover Page Footnote

Professor of Law, Case Western Reserve University. For comments on a draft, I am grateful to Peter Gerhart, Juliet Kostritsky, and Andy Morriss.

RULES, STANDARDS, AND THE INTERNAL POINT OF VIEW

Dale A. Nance*

In 1897, Oliver Wendell Holmes presented his now famous “bad man” theory of law:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. . . . The prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.¹

This view has had profound influence among strands of legal thought otherwise as diverse as American Legal Realism and Law and Economics. By some accounts, it has become an integral part of the dominant instrumentalism of American legal thought.²

But it is ultimately misguided. One of the contributions H.L.A. Hart made to modern jurisprudence was to remind us of the importance of the fact that many people in a legal system take what he called the “internal point of view” toward its laws. Hart wrote,

At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons’ behavior in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both points of view and not to define one of them out of existence.³

This observation was part of a pointed rejection of theories, like that of Holmes, which would filter out the perspective of the person who takes such an internal point of view.⁴ The relevance of Hart’s observation has

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1. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459, 461 (1897).

2. See Robert Samuel Summers, *Instrumentalism and American Legal Theory* (1982).

3. H.L.A. Hart, *The Concept of Law* 90-91 (2d ed. 1994).

4. The distinction between the internal and external points of view is a practical one, relating to reasons for action, not a theoretical one, relating to the attitudes of observers of a legal system, although one can (and Hart did) address a different distinction between a

been confirmed by empirical studies indicating that there are many reasons other than fear of sanctions that motivate people to obey the law.⁵ Holmes notwithstanding, it is hardly "pretentious" to recognize such a salient fact in articulating a general theory of law and legal obligation.⁶

Hart's analytical insight, however, only hints at an important normative claim, one which is a running, if implicit, theme in the work of scholars such as Lon Fuller and Friedrich Hayek.⁷ The normative claim is that it is *valuable* that people take this internal point of view, that the health of a legal system *qua* legal system is, in no small part, a function of how many of its citizens—how firmly and how consistently—take the internal point of view toward its laws.⁸ That may seem obvious, but my preliminary purpose here is to elaborate (in Part I) on why it is so. The general thrust of the present discussion is that, in addition to its contribution to economizing on enforcement costs, there is a connection between the internal point of view and the aspiration to republican self-government: the greater the incidence of the former, the greater the achievement of the latter, *ceteris paribus*. This fact imbues the notion of a healthy legal system with a crucially normative component that goes beyond, and need not be inconsistent with, efficient social organization.

My principal, presumably less obvious, purpose is to explore (in Parts II-VI) how this normative claim may have significant implications for the selection and use of particular forms of legal norms. Specifically, my present topic is the "rules versus standards" debate. Although Hart wrote in terms of attitudes toward rules, obviously the internal/external distinction can be generalized to a difference in attitude about legal norms, whether rules or standards, and we can consider the implications of the need to nurture and sustain the internal point of view toward legal norms. I argue that, under a realistic depiction of the social and economic conditions in which legal norms are recognized, adopted, or promulgated, a fairly strong case can be made for the employment of relatively definite norms ("rules") over the employment of less definite, balancing or discretionary norms ("standards") in regulating nonofficial conduct, again *ceteris paribus*. This

sympathetic (or hermeneutic) theoretical understanding (in which Hart himself was engaged) and a more behaviorist theoretical understanding of actors in a legal system. See Scott J. Shapiro, *What Is the Internal Point of View?*, 75 Fordham L. Rev. 1157 (2006).

5. See, e.g., Tom R. Tyler, *Why People Obey the Law* 3-7, 24-26, 178 (1990).

6. Elsewhere, I have illustrated the important implications of this point for more narrow legal issues by using the internal/external distinction to articulate the proper way to understand the difference between property rules and liability rules. See Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 Va. L. Rev. 837 (1997).

7. See, e.g., Lon L. Fuller, *The Morality of Law* (rev. ed. 1969); 1-3 Friedrich Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (1973, 1976, 1979).

8. For convenience, I refer to "citizens" as the nonofficial subjects of law to distinguish such people from those who are acting in an official capacity. I recognize, of course, that many subjects of law are not citizens in the technical sense, but it will be unnecessary to distinguish between citizens and noncitizen subjects.

is because rule-based decision making by officials facilitates self-application of legal norms by citizens in a manner that more accurately anticipates official judgment, which in turn is an important ingredient for fostering the internal point of view among the citizenry and preventing substantive injustice in the presence of those who nonetheless take the external point of view. An important feature of this argument is the recognition that the extent of acceptance of the internal point of view is not fixed over time, but can be affected by many factors, including the form in which laws are adopted and implemented.

To be clear from the outset, I do not claim that rules are *always* the correct instruments of legal guidance. I claim only that rules are to be preferred when the situation admits of their use, especially within a particular domain of legal norms. That particular domain is the subset of legal norms that are principally directed at regulating the conduct of nonofficial citizens (or citizens in their unofficial capacity) and only secondarily at regulating the conduct of officials in their review of the conduct of citizens. To put the point more precisely, the more legal norms are directed at citizens rather than officials, the greater the strength of the preference for rules, *ceteris paribus*. Again generalizing from Hart's terminology, one can refer to the context in which the asserted preference holds as the context of "primary" norms.⁹

I address only in passing the question of the choice between rules and standards in governing the behavior of officials. In part, this is because the issues in that context are quite different, concentrating on matters of intra-governmental management.¹⁰ In part, this is because it is unlikely that the employment of standards can be wholly eliminated from a legal system.¹¹ My claim is that standards should be squeezed out of a certain domain of law, to the extent possible, even if they must reappear in some form somewhere else. For similar reasons, I exclude the law of procedure from the scope of my thesis. While it is possible for citizens to take cognizance of procedural norms, lay citizens are not generally the intended audience; procedural norms are primarily directed at officials and those quasi-officials—lawyers—who assist in the operation of the legal system.¹²

9. Hart distinguished between "primary rules," which govern the conduct of citizens, and "secondary rules," which "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." Hart, *supra* note 3, at 94. Referring to primary and secondary "norms" generalizes Hart's language to include both "rules" and "standards," as characterized in later discussion.

10. See, e.g., Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807 (2002) (discussing the choice of rule or standard in deciding the form of judicial review of administrative lawmaking).

11. See, e.g., Paul M. Shupack, *Rules and Standards in Kennedy's Form and Substance*, 6 Cardozo L. Rev. 947 (1985).

12. For a discussion of the role of rules and standards in one pocket of the procedural world, see Dale A. Nance, *The Wisdom of Dallas County*, in *Evidence Stories* 305 (Richard Lempert ed., 2006) (addressing the role of standard-based judicial discretion in the admission of hearsay evidence).

Thus, I argue in support of the quite traditional proposition that citizens should be given maximum practicable definiteness in the laws that regulate their non-litigation conduct.¹³ If there is reason to defend this seemingly unexciting proposition, it is that the proposition has been challenged in recent decades from a variety of directions. Some challenge the traditional wisdom as arbitrarily privileging the value of autonomy, thereby neglecting altruism.¹⁴ Others in effect challenge it as insufficiently sensitive to the law's role in maximizing social wealth and the dependence of that role on context.¹⁵ Still others believe that sacrificing ad hoc flexibility to ex ante predictability is a bad idea so long as the state has monopoly control over the content of legal norms provided for citizens.¹⁶ I will defend the traditional wisdom against such challenges.

I. THE INTERNAL POINT OF VIEW, OPTIMAL ENFORCEMENT, AND SELF-GOVERNANCE

Corresponding to Hart's distinction between the internal and external points of view, legal theory has long recognized that (at least) two quite distinguishable purposes are intended to be served by law. One is to prevent or rectify wrongdoing by individuals who are unable or unwilling to internalize what the promulgators of law consider to be serious social norms, to deal with the recalcitrant or "bad" person who takes the external point of view toward such norms. This purpose corresponds to an "enforcement" function of law. The other purpose is to provide guidance to individuals in those contexts where serious social norms are contested or otherwise uncertain, to resolve disputes over such norms for the use of the law-abiding or "good" but "puzzled" person. This purpose corresponds to a "guidance" function.¹⁷ The serious social norms that might require enforcement may or may not be those that are articulated in law in response to the need for guidance; some serious social norms are recognized as law

13. The indicated preference has ancient roots. Plato went so far as to opine that "unless you are definite, you must not suppose that you are speaking a language that can become law." 2 The Dialogues of Plato 491 (B. Jowett trans., Random House 3d ed. 1937). Aristotle was less limiting, but still endorsed a preference for rules:

Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.

The Politics of Aristotle 127 (Ernest Barker trans. and ed., Oxford Univ. Press 1962). The Roman law maxim put it simply, "*Ius finitum et debet esse et potest*" ("the law can and should be definite"). Okko Behrends, *Formality and Substance in Classical Roman Law, in Prescriptive Formality and Normative Rationality in Modern Legal Systems* 207, 215 (Werner Krawietz et al. eds., 1994).

14. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

15. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).

16. See, e.g., John Hasnas, *The Myth of the Rule of Law*, 1995 Wis. L. Rev. 199.

17. See Nance, *supra* note 6, at 859.

solely for the purpose of enforcement, not because there is serious controversy or uncertainty about their social authority.

A “utopia of legality” would contain no recalcitrant individuals, no persons who take the external point of view toward legal norms. In such a world, however, there would still be need for the guidance function, relating to the law-abiding. This need is occasioned by good faith conflicts on serious matters of principle that must be resolved, however tentatively, and by problems of coordination that must be resolved, however arbitrarily, in order for life in a community to continue without conflict. To be sure, a more complete utopia might not involve any such conflicts or coordination problems, but in such a world there would be no need of law at all.¹⁸ In contrast, trying to imagine a society in which law’s guidance function is not needed, in which the law’s sole function is enforcement, is difficult indeed. Because any organized enforcement function requires guidance norms regulating adjudication and the application of sanctions, only the simplest of societies could sustain law that is pure enforcement.¹⁹ Given this core recognition of the importance of the guidance function to the point of law, dealing with recalcitrants is, arguably, secondary and contingent, not to say unimportant.²⁰

Already, my first claim—that it is valuable that citizens take the internal point of view—seems at least plausible. If citizens turn to law for the resolution of their disagreements, one would expect them to internalize the law’s resolutions. One might plausibly argue that citizens have an obligation to do so.²¹ And that is one sense in which one might say that it is valuable that citizens take the internal point of view. But many citizens may not see it that way. For example, a citizen may plausibly believe that he has a residual right, perhaps a duty, to follow his own moral views,²² or—less admirably—he may want the law to resolve his controversy with others as long as the law resolves it the way that he wants it resolved, feeling free to disregard the law as guidance if the law goes the other way, attending then prudentially only to the risk of law’s sanctions.

18. For an in-depth treatment of the implications of the need for authoritative resolution of such conflicts among people of good faith, see Larry Alexander & Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (2001).

19. *Id.* at 218-19; *cf.* Hart, *supra* note 3, at 89-91. Hart, of course, argued that the minimum conditions for the existence of a legal system include officials’ acceptance of the internal point of view toward the secondary rules of recognition, change, and adjudication. *See id.* at 113.

20. *See* Gerald J. Postema, *Positivism, I Presume? . . . Comments on Schauer’s “Rules and the Rule of Law,”* 14 Harv. J.L. & Pub. Pol’y 797 (1991). Postema argues,

Law uses both of these devices [internal guidance and external obstacles]; sometimes one is more prominent, sometimes the other. But internal guidance is (and, I would maintain, must be) the primary device. That is, it is characteristic of, perhaps essential to, law to provide (or at least purport to provide) us with reasons why we should act in certain ways.

Id. at 799.

21. For extended discussion of the issue, see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979).

22. This dilemma is explored in Alexander & Sherwin, *supra* note 18, at 53-95.

Psychologically, that some or many people may thus want to have their cake and eat it, too, should be anything but surprising. How, then, should the managers of our legal system respond? Should they care, and if so, how much?

We have seen that law's regulation of conduct proceeds in two paradigmatic modes, guidance and enforcement, that respond to two distinguishable attitudes toward law, the internal and the external point of view. Consequently, the question becomes, how much effort should the state put into shaping conduct to conform to substantive legal norms by way of cultivating the internal point of view, and how much should it put into shaping conduct by way of enforcement? No legal system of any size can hope to bring citizens' conduct tolerably in line with primary legal norms relying exclusively on the threat of coercive sanctions, nor by relying exclusively on voluntary compliance by its citizens. One can then speak of optimization, reaching the optimal balance between these two efforts. Whatever the optimizing point, one thing is plain: Widespread internalization of law's substantive norms reduces the state's enforcement costs necessary to attain any given level of compliance, and substantially so, if only because it multiplies dramatically the number of agents whose efforts maintain and reinforce the law's substantive norms of conduct.

But that is not all. Perceptions of the law's substantive justice and procedural fairness are important causes of citizens' respect for the law and thus their adoption and maintenance of the internal point of view.²³ Consequently, a well-developed internal point of view becomes an important proxy for perceptions of substantive justice and procedural fairness, which in turn are important proxies (and sometimes determinative of) actual substantive justice and procedural fairness. Of course, one may say that the implication, for those who administer legal systems, is that they should pursue justice and fairness, and allow the internal point of view to follow in train. Certainly they should pursue justice and fairness, but aside from the fact that proxies are sometimes more easily measured and targeted than the value for which they are proxies, this view would mistake the web of mutually reinforcing forces at work.

To see the point, imagine two societies roughly equivalent in all ways except that, in one, the level of compliance is maintained by twenty-five percent of the citizenry accepting the internal point of view, while in the other, the same level of compliance is maintained by seventy-five percent of the citizenry accepting the internal point of view. In particular, assume that the increased costs of the (nonenforcement) efforts to maintain

23. See Tyler, *supra* note 5; see also Robert S. Summers, Form and Function in a Legal System—A General Study 284 (2006). Summers observes,

In tolerably well-ordered societies, a major factor that influences addressees voluntarily to act in accord with rules and other valid law is the general respect they have for the law [S]uch respect derives largely from the sense that addressees have that law is for the common good, that particular laws themselves are justified, and that the system of law and its manner of operation are acceptable.

Id.

internalization in the second society are exactly offset by the savings in enforcement costs, so that net governmental efforts and degree of citizen compliance with primary norms are the same in the two societies. Without regard to the justice of the substantive norms or the fairness of procedural norms, which by hypothesis are the same in the two societies, are they equally praiseworthy legal systems? I would say not. The latter is, *qua* legal system, *healthier* than the former. To what may we attribute this intuition?

Return for a moment to the idea of a utopia of legality, one in which all citizens take the internal point of view toward the primary norms of conduct. As Lon Fuller illustrated, such a utopia of legality can be imagined, and the obstacles thereto can be analyzed, without assuming any particular form of government. His allegorical monarch, King Rex, faced a multitude of problems—such as lack of clarity, inconsistency, and retroactivity in promulgated norms—in his well-intentioned efforts to create even a minimal system of law for his undeniably law-respecting subjects.²⁴ This was an intentional conceit, because Fuller wanted to distinguish the morality of law from the morality of political organization. Fuller believed his arguments to be useful in assessing lawfulness in monarchies and dictatorships as well as democracies. But in assuming that King Rex's subjects took this internal point of view about law, Fuller was (intentionally) passing over the important matter of the causal relationships between political organization and the inclination of subjects to take the internal point of view.

In a pure democracy, where the promulgators are the citizens themselves, it is relatively easy for citizens to regard legal norms that reflect the resolution of issues of principle or coordination from the internal point of view. To be sure, there is the possibility that those whose view does not prevail on an issue will lose the sense of self-governance and adopt the external point of view toward the promulgated law, especially if they are consistently on the losing side of debates about matters of principle. But the collective aspiration, in accepting or developing such a political system, is to achieve and maintain the internal point of view toward the legal system's solutions to those problems that require collective action. Under republican government, representation of the electorate by others opens up more authoritative distance between the law that is promulgated and the people governed by it, which makes it harder for the electorate to achieve and maintain the internal point of view. Still, as in a pure democracy, that is the aspiration. A sense of authorship becomes a wellspring of the internal point of view.²⁵

24. See Fuller, *supra* note 7, at 33-38.

25. One can, of course, develop a theoretical account of legal authority and legal obligation that does not necessarily depend on the idea of direct or indirect citizen authorship. See, e.g., John Finnis, *Natural Law and Natural Rights*, at ch. 9 (1980). But that does not gainsay the importance of such a sense of authorship in cultivating and maintaining the internal point of view.

Fuller, however, perceived another, more subtle and thus more often neglected way in which citizens can have a connection with legal norms that cultivates and maintains the internal point of view. They can engage their cognitive faculties in the application of legal norms to themselves and others. They then make judgments about the lawfulness of their own acts and the acts of others. This, of course, is simply one manifestation of the fact that most substantive legal norms are intended to provide citizens with guidance. Although direct or indirect citizen authorship, together with the achievement of substantive justice and procedural fairness, rightly claim pride of place in cultivating and maintaining the internal point of view, the importance of the practice of *self-application* to a healthy legal system should not be underestimated. This form of participation augments the subjects' sense of "ownership" of (or "investment" in) the legal system itself and thus their commitment to it.²⁶ By the practice of self-application, citizens cultivate an attitude of lawfulness that sustains and encourages responsible political participation, which in turn further contributes to the sense of authorship, and so on in a web of reciprocally reinforcing social attitudes and practices.²⁷ Even in the context of criminal prosecutions, where it makes most sense to say that the law often must simply "act upon" persons who have already acted by committing crimes, there remains an important value in engaging the accused in dialogue, premised on the idea that the accused can be made to *understand* that his actions violate the law, if that is so.²⁸ This, of course, presupposes that the accused can self-apply the law's norms, even if that requires the assistance of lawyers, juries, and judges after the fact.

To return to my hypothetical pair of societies, one might well say that the second society, the one attaining a seventy-five percent internal point of view, will be subjectively happier just in the fact of the sense of ownership described, or more successful as a social group because of the greater commitment to a shared legality, or that these facts will generate dynamic effects, augmenting substantive justice or procedural fairness in the fullness of time. In these respects, the two societies are not identical, which would seem to violate my *ceteris paribus* assumption. On this point, I care not. Whether or not one monetizes (or "utilizes") the happiness, group successfulness, or future moral benefits associated with citizens' sense of self-government, my point is that optimizing enforcement costs does not tell

26. Cf. Ronald Dworkin, *Law's Empire* 190-216 (1986) (arguing that such a "protestant" idea of law helps to justify the law's claim to obedience).

27. Jules Coleman put it nicely:

The internal point of view, as expressed in public behaviour, creates and sustains a sense of reciprocity: that free riding or non-compliance is subject to public criticism, and so on. Stability, reciprocity, and mutuality of expectation are created and enhanced by the behaviour exhibited by those accepting a rule from the internal point of view.

Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in Hart's Postscript: Essays on the Postscript to *The Concept of Law* 99, 120 (Jules Coleman ed., 2001).

28. See R.A. Duff, *Trials and Punishments* 110-19 (1986).

the full story if it does not attend to the various implications of internalization beyond immediate compliance.

Much modern theorizing about law has failed to recognize the full importance of maintaining and cultivating the internal point of view among the citizenry. The “bad man” theory of legal obligation is perhaps the most conspicuous failure in this regard. When Holmes gave his famous “bad man” speech, “The Path of the Law,” at Boston University School of Law, he was advising students on the best way to think of legal obligation and, therefore, the best way to advise clients.²⁹ As already noted, this kind of recommendation has had profound effects on the legal profession. Yet, it is hardly the best way to preserve and cultivate the internal point of view among the citizenry to have lawyers advising clients by taking the external point of view. Although tangentially relevant in what follows, for the most part I shall leave this important issue to be addressed by others.³⁰

II. THE FORM OF LEGAL NORMS: RULES VERSUS STANDARDS

The nexus between self-governance and the internal point of view has important implications for the choice about the form of legal norms presented by the “rules versus standards” debate. The use of rules, I shall argue, tends to foster and maintain the internal point of view better than the use of standards. As a prelude to the arguments in that regard, this section briefly reviews now-conventional understanding of the choice between rules and standards.

I will take as primitive the idea that “rules,” as normative directives about conduct, are framed in terms of concepts that can be applied without explicit reference to the principles or policies that might have motivated the rule, usually by specifying operative facts that trigger the rule. Rule-based decision making takes this capacity seriously.³¹ Correspondingly, I take the use of standards to involve recourse to justificatory principles or policies, mediated by some form of balancing that does not specify in advance the result thereof. The important difference, then, between the rule-based and standard-based decision making, at least for present purposes, is that the former involves adjudication in accordance with norms that specify in advance, and with considerable definiteness, the results of the necessary balancing, whereas the latter involves adjudication in accordance with a

29. See Holmes, *supra* note 1.

30. See generally Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545 (1995); W. Bradley Wendel, *Professionalism as Interpretation*, 99 Nw. U. L. Rev. 1167 (2005). For a consideration of the problem in the context of an important area of practice, see Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. Rev. 1265 (1998).

31. See generally Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991).

balancing of competing factors in the context of the particular case by some official after the occurrence of the events to which the standard is applied.³²

To be sure, a norm may be expressed in a way that looks like a rule, but in fact operates as a standard. For example, the simple negligence norm, "do not act unreasonably," appears rule-like, but the judgmental term "unreasonably" might signal a balancing approach, although it fails (at least on its face) to provide any factors that are to be considered in drawing the balance.³³ On the other hand, if this legal norm is applied in a way that incorporates and makes controlling established social customs about what is and is not reasonable, then the legal norm operates as a rule after all, provided the established customs are adequately definite.³⁴ For my purposes, I mean a norm to be most "rule-like" when it eliminates all normative judgment beyond the determination of operative adjudicative facts specified by the rule and those operative facts are not framed in terms that reintroduce an implicit, seriously controvertible, normative judgment. This obviously is an ideal conception to which most practical norms can only aspire.³⁵

As this last point suggests, and has been noted by others, we are dealing here with a spectrum of legal methodologies, ranging from the most rule-governed decision making, using "pure" or "opaque" rules, that are applied without reference to underlying justifications, to the complete absence of nominal guidance for the citizen that appears in the creation of a *cadi* jurisdiction, in which an official is empowered simply to make the best decision for all concerned as to any dispute within the indicated jurisdiction that comes before that official. Between these extremes, one can find a variety of decision-making forms, including "presumptive" rule-based decision making (which accords significant but non-conclusive weight to following the authoritative rule), rule-sensitive particularism (which seeks to make the best decision all things considered, but where one of the things considered is the value of following rules), the use of rules of thumb (which employ a nominal rule to point to their underlying justifications, but otherwise acknowledge no independent reason to follow the stated rule), the employment of multi-factored tests coupled with announced goals to aid in reaching the proper balance of competing factors, the use of multi-factored

32. See Hart, *supra* note 3, at 127-30; see also Kaplow, *supra* note 15, at 560 ("This Article will adopt such a definition, in which the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act.")

33. See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 Or. L. Rev. 23, 27-28 (2000).

34. See Fuller, *supra* note 7, at 64. This remains true even if the established customs are (or at some point in time were) established by performing a cost-benefit analysis or other form of balancing, so long as the application of the negligence norm is not the occasion for a fresh consideration of the competing factors.

35. See Alexander & Sherwin, *supra* note 18, at 33-34 (emphasizing the contingent relationship between factual form and determinateness).

tests without an articulated goal, and so forth.³⁶ To simplify the discussion, I will refer generically to rules versus standards, or to rule-based versus standard-based decision making, and draw a variety of contrasts that, if necessary, could be translated for greater precision into the more cumbersome language of a spectrum. No claim I make depends on a strict categorical distinction.

I pass over the question of whether governance by rule is truly possible, that is, whether rule-based decision making is, in theory or in practice, distinguishable from standard-based decision making. I accept without argument that there is a theoretical and often a practical difference between the two, that the former does not inevitably reduce to the latter.³⁷ And this is so despite the familiar facts that norms adopted as standards can become rules as a consequence of the operation of the doctrine of precedent³⁸ and that, conversely, norms adopted as rules can become standards by the (perhaps pernicious) operation of the doctrine of precedent.³⁹

Granted these subtleties, long familiar arguments have centered on the conflicting virtues of the "fair notice" function of rules and the tailored justice possible under standards.⁴⁰ More recent commentary has focused on the question of relative institutional competency and role differentiation. Rules are understood to be crude instruments, almost inevitably over- and under-inclusive relative to their underlying justifications, so that application of the rule without recourse to those justifications predictably leads to "justificatory errors," that is, decisions at variance with the result dictated by a full and accurate consideration of all justificatory factors.⁴¹ Rules are nonetheless considered desirable when the lawmaking authorities, particularly legislatures and appellate courts, are sufficiently better able to draw the balance of competing considerations, even when addressing a relatively broad class of cases, such that a net increase in such errors would result from lower officials' attempts to engage in "all things considered" particularized assessments in individual cases.⁴²

36. Most of these are summarized in a useful article: Frederick Schauer, *Rules and the Rule of Law*, 14 Harv. J.L. & Pub. Pol'y 645, 647-51 (1991).

37. For arguments supporting this assumption, see *id.* at 657-63, 665-79.

38. See Kaplow, *supra* note 15, at 577-79. Even more obviously, a statute that promulgates a standard for conduct may be converted into a rule by the delegated authority of an agency to promulgate rules that give effect to the legislative standard. See Hart, *supra* note 3, at 127-28. For present purposes, such a norm is considered a rule, because our interest resides in the behavior of the persons whose conduct is regulated, not the intra-governmental relation between legislature and agency.

39. See Korobkin, *supra* note 33, at 26-27 (noting the potential effect of the creation of indefinite exceptions to a rule).

40. See Kennedy, *supra* note 14, at 1694-1701 (discussing these and other considerations).

41. See Schauer, *supra* note 31, at 31-34. In principle, and to a limited extent in practice, a rule can be made increasingly complex so that over- and under-inclusion are reduced. See *id.* at 155-56; Kaplow, *supra* note 15, at 586-96. Such "complexification," however, carries with it many (though not all) of the difficulties associated with standards. See generally Richard A. Epstein, *Simple Rules for A Complex World* (1995).

42. See Schauer, *supra* note 36, at 685-86.

Conventional law and economics analysis has enriched this picture in several ways. For example, it highlights administrative costs, with the result that front-loading the administrative costs associated with rule-based decision making will tend to be optimal, *ceteris paribus*, in contexts where much of the same kind of dispute recurs frequently. The back-loaded costs of standards-based decision making will tend, *ceteris paribus*, to be optimal when factual heterogeneity across a class of regulated activity, including variation over time, makes particularized norm adaptation useful.⁴³ More important for our purposes, economic analysts have encouraged us to emphasize the effect of the choice between rules and standards on the behavior of citizens governed by the norms. This extends not only to the behavior of individuals whose relationship is governed by rules or standards (what I will call the "interactional" context), but also to the context in which one or both of those individuals considers transferring the entitlement governed by the rule or standard to another (what I will call the "transactional" context).

I will make reference to the prevailing wisdom on these matters in what follows, but for the moment suffice it to say that no general preference for rules or standards seems to have emerged from such analyses. Surveying the literature, Russell Korobkin has concluded interestingly that no meta-rule emerges from the conventional law and economics analysis, only a set of factors that generate a meta-standard to be applied to each context in which the choice of rules or standards is to be made.⁴⁴ Korobkin goes on to argue that even a more nuanced behavioral analysis, with attention to the ways that people do not act as rational economic maximizers, fails to yield a clear preference for rules or for standards.⁴⁵

My thesis is that we can say something more definite than this, once the contingent, but nonetheless clearly identifiable, facts of our common reality and our aspirations to self-government are taken into account.

III. RULES, STANDARDS, AND SELF-GOVERNANCE: A FIRST LOOK

The use of standards can be criticized as involving inherent delegation of lawmaking authority to the decision maker employing the standard—that is, mostly judges, particularly trial judges. Like all delegations of lawmaking authority, this is viewed skeptically by those who consider legislatures the more democratically responsible authorities.⁴⁶ This idea borders on what I

43. See, e.g., Kaplow, *supra* note 15, at 585.

44. See Korobkin, *supra* note 33, at 42-43.

45. *Id.* at 58. This agnosticism or ambivalence is not limited to those who approach the question from the perspective of law and economics. Not surprisingly, critical legal theorists have concluded that the appropriate policy choice is even more starkly indeterminate. See Mark Kelman, *A Guide to Critical Legal Studies* 15-63 (1987).

46. Representative of this view is the jurisprudence of Justice Antonin Scalia. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989). To be sure, Scalia's main concern in that article was the relationship between appellate courts and lower courts, to which the democratic accountability issue becomes less salient, as he recognized. *Id.* at 1176-77. Scalia's further arguments attempt to justify his resistance

want to discuss, but I am not concerned here with the question of democratic accountability as a matter of moral philosophy. Instead, I want to focus on the effects of the choice of modality on the attitude of the citizenry as it encounters legal norms that may apply to the citizens' conduct.

There are two ways that the use of standards complicates and, under plausible empirical assumptions, attenuates the sense of self-governance. First, in rough parallel with the accountability argument, delegation of lawmaking authority to lower level officials creates unnecessary distance between the elected authors of law and the law as actually applied and, therefore, between the electors and the law as actually applied. This arguably dilutes the electorate's sense of authorship of the laws it encounters, which in turn may have a detrimental effect on citizens' ability to take the internal view toward law. While there is probably some truth in this claim, it is difficult to imagine that the degree of acceptance of an internal point of view toward law's norms among the citizenry in any sizeable modern society is significantly affected by the fact that the norms are articulated with specificity by elected representatives, themselves fairly distant from the citizenry, rather than officials to whom those elected officials delegate, with greater or lesser guidance, the responsibility to fashion the norms.

The second phenomenon is somewhat more subtle but, I believe, ultimately more significant. It concerns not the citizen's connection to the making of law, but rather the citizen's connection to the application of law. Interestingly, when one focuses on application, it would seem that using standards would be more compatible (than using rules) with the self-governance that is our republican aspiration. After all, a person to whom the standard is addressed, by being required to engage the assessment of principles and policies and the balance of competing considerations, participates in the law-applying process. Such participation should contribute to a sense of self-governance, even if the subject does not feel close to the process of the standard's authorship. To the extent that the application of general standards involves delegated lawmaking activity, the subject participates in that activity at the very point of its application.

But any general preference for standards would entail serious problems. By effectively delegating much of the lawmaking functions to the citizenry, promulgators of standards to that extent abandon the task for which law-abiding citizens have need of law. The more standard-like a norm is, the more it fails to give guidance to citizens about the resolution of those conflicts and disagreements that citizens need resolved by law; at least it fails to do so at the moments of action when they need such matters

to balancing tests and discretion (i.e., standards) and his preference for rules, a preference that is reflected in his judicial opinions. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 931-33 (1997).

resolved.⁴⁷ Arguably, widespread use of standards undermines the reciprocity between government and the governed that is an important moral foundation of both the duty of obedience and the right to rule.⁴⁸ Of course, just as citizens may have no difficulty refusing to abide by law's resolutions, despite an arguable moral obligation of obedience, so too the promulgators of law may fail to honor an arguably reciprocal commitment to resolve such issues definitely. They may cite the administrative costs of developing sound rules, for example. And they might be right—that is, any particular choice of a standard might not simply be a pretext for avoiding the hard work of formulating good rules. Nevertheless, a variety of practical counterarguments, ones that may have stronger appeal to lawmakers than the moral reciprocity argument, give further support for a preference for rules. The following sections lay out these counterarguments.

IV. RULES VERSUS STANDARDS: THE INTERACTIONAL CONTEXT

I begin with the assumption—which will be relaxed in Part VI—that all citizens involved are *inclined* to take the internal point of view, if it is possible for them to do so. With that assumption, I address first interactional contexts, those in which citizens choose conduct in light of existing entitlements; no transfer (including contractual modification) of the entitlement is involved—because such transfers are prohibited, because transaction costs are too high for such a transfer to occur, or because there simply is no interest on the part of the parties in making such a transfer. Here is to be found much of the law of torts and crimes, including the vast array of regulatory offenses.

When given a rule, a citizen inclined to follow the rule can attempt to apply it to his or her own circumstances. If the question of enforcement comes up, the citizen can, and usually will, predict enforcement based on his or her own application of the rule. For example, given a specific speed limit on a particular road, the citizen will predict being stopped for speeding based mostly on her own assessment of whether or not she exceeds that speed limit.⁴⁹ Obligation is perceived first, enforcement is predicted second. In contrast, when given a standard, when told for example to drive no faster than is reasonably safe under the conditions or to balance competing needs for safety and rapid transportation, a citizen will quickly

47. See Alexander & Sherwin, *supra* note 18, at 28-32. Personifying law as the law-giver, "Lex," Alexander and Sherwin state the matter succinctly: "[I]f uncertainty and disagreement about how moral principles apply in concrete situations are what give rise to the need for Lex and Lex's rules, Lex's rules are responsive to this need only if they themselves do not engender uncertainty and disagreement about their concrete applications." *Id.* at 32-33.

48. See Fuller, *supra* note 7, at 38-41.

49. As this particular example suggests, the citizen may have to make allowances for a pattern of partial nonenforcement, and this itself may generate some of the same problems associated with standards. See Margaret Raymond, *Penumbra Crimes*, 39 Am. Crim. L. Rev. 1395 (2002).

understand that the balance is a matter of opinion and, therefore, will tend to assess obligation by way of prediction; the citizen will look to the authority whose opinion about the appropriate balance will be controlling in terms of legal consequences. In this way, prediction will precede obligation.⁵⁰ As compared to rules, this encourages the citizen to take the external point of view. Reinforcing this tendency is the differential disappointment and frustration that the citizen will feel if it is less likely that his own assessment of the balance under a standard will match the balance struck by officials than that his own application of a rule will match official application of the rule. The following paragraphs explore why such an increased interpretational gap can be expected.

As already noted, one of the important reasons that lawmakers have recourse to rules is that the application of standards by inferior officials—trial courts, agency administrators, prosecutors—can produce judgments regarding the balance of competing considerations that do not match closely enough the balance that would be determined by the law's promulgators—legislatures or appellate courts, as the case may be. But by pinning down inferior officials, promulgators also create greater predictability from the point of view of those citizens whose conduct is to be governed.⁵¹ While the gap between authorship and application by officials is not unimportant in terms of the incidence of justificatory errors, the potential for a gap between the applying officials and the law's subjects is more important in regard to citizens' sense of self-government.

First, the officials who make and apply law are generally drawn from a class of people—lawyers—who tend to share social, educational, and vocational experiences, a shared background that can be expected to generate greater homogeneity of response to the problem of applying the balancing tests, or other forms of discretion, that characterize standards. In contrast, the overwhelming majority of citizens do not generally share that professional culture, which will cause a gap between citizen and official application of standards.⁵² Such mismatches lead to disappointment and

50. Cf. Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. Legal Stud. 13, 23-24 (1985) ("Mechanical rules . . . are predictable and relatively inexpensive to apply: generally speaking, they can be applied by laymen with little or no input from lawyers or judges. . . . In contrast, judgmental rules . . . are unpredictable and relatively expensive to apply. Judgmental rules require a large input of legal advice and possibly even a judicial trial (or legislative or administrative action) before the assignment of property rights can be established."); see also *id.* at 19 n.28 (noting that what Merrill calls "judgmental rules" are often referred to as standards).

51. See Schauer, *supra* note 31, at 137-45 (discussing the value of rules in protecting citizens' reliance interest).

52. See Korobkin, *supra* note 33, at 34-35, 37, 48-49. The problem can be ameliorated to some extent by the employment of lay juries when standards must be applied. The use of lay juries supports the internal point of view among the citizenry in at least two ways: (1) Jury judgment helps to reduce the gap between legal judgment and lay expectations, and (2) juror participation in retail law-articulation and law-application helps to maintain juror-citizen connection to the law.

frustration when citizens find their disparate ex ante assessments fail to mesh with the ex post assessments of the courts.⁵³

Additional sources of disappointment and frustration arise from pervasive bias of various kinds. The law's subjects generally find themselves in situations where their self-interest will exert a powerful clouding influence on their judgments, even if they are acting in good faith—that is, even when they are attempting to maintain the internal point of view toward the law's norms. This self-interest can and will be given greater play in the context of the uncertainties in the application of standards.⁵⁴ At the same time, adjudicators who are called upon to apply legal norms after the fact are subject to their own sources of bias that have a freer play in the context of standards. Personal or political agendas can come into play when officials encounter the particularities of a case governed by a standard, and this is true even if they accept the internal point of view toward the standard to be applied.⁵⁵ Beyond that, a more specific cognitive form of bias can be expected. An adjudicator's assessment of the appropriate balance of competing factors under a standard is made in the context of knowing the consequences of actions that, to the actors, were uncertain ex ante. This "hindsight bias" will, for example, amplify the difference between an actor's self-interested prediction of low risk and the court's ex post assessment of the risk of an action that is now known to have caused harm.⁵⁶

The use of rules does not entirely eliminate the potential for mismatches between the citizen's legal judgment and that of officials. But as compared to governance by rules, the three factors identified can be expected to increase substantially the number of such mismatches when citizens encounter standards. Adding insult to injury, such mismatches will occur

53. The exceptional situation often noted is one in which the legal norm employs or incorporates by reference a standard that has independent social meaning, such as a business or social custom. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 609 (1988) (discussing efficiency of a standard of "commercial reasonableness"). Rose's discussion presents what I have called a transactional context, concerning transactions between merchants governed by the Uniform Commercial Code, but one can imagine business custom being invoked, say, in a nuisance suit. As already noted, however, the more factually specific or otherwise determinate such a custom is, the more rule-like becomes the legal norm that incorporates it, in which case the situation is not in truth exceptional. See *supra* notes 33-34 and accompanying text.

54. See Korobkin, *supra* note 33, at 46. Risk aversion in contemplation of an uncertain official judgment seems to cut the other way, inducing citizens to make a conservative assessment of the scope of their entitlements, but there is no reason to think that risk aversion offsets bias in each citizen, and for those in which bias and risk aversion are both at work, there is no reason to think that the two effects roughly cancel each other. Cf. *id.* at 37-38.

55. *Id.* at 38-39.

56. *Id.* at 47-49. Like most heuristics, hindsight bias does not necessarily reflect an irrational adaptation to the environment; it all depends on context. See Ulrich Hoffrage & Ralph Hertwig, *Hindsight Bias: A Price Worth Paying for Fast and Frugal Memory*, in Gerd Gigerenzer et al., *Simple Heuristics That Make Us Smart* 191 (1999). But in the context of adjudication, hindsight bias can present significant problems. See Mitu Gulati et al., *Fraud by Hindsight*, 98 Nw. U. L. Rev. 773 (2004).

despite the greater time and effort that citizens must put into the task of assessing the import of law's norms for their conduct, for one of the advantages of rules is the time and energy saved by not having to conduct the balancing of competing considerations at retail, that is, by each citizen on each occasion presented.⁵⁷ Such disappointment and frustration, in turn, can be expected to undermine citizens' commitment to the internal point of view, driving citizens to take a more predictive viewpoint toward the behavior of officials. In the extreme, there is the risk that respect for law will transmute into manipulative supplication of officials, as citizens begin to take actions that signal to the state that they possess characteristics valued by officials, even when such characteristics do not relate to the justifications of the particular legal norm. Especially under the flexibility of standards, such characteristics might affect, and might be expected to affect, official decision making.⁵⁸

Naturally, one must consider the potential to obtain help from lawyers that can address these problems. For a variety of reasons, however, this option will do little to dampen the indicated corrosive process that standards encourage. Most significantly, a great many people are willing and able to pay for legal assistance only in the most unusual of contexts; for other situations, they will rely on their own assessment of the law's demands, with the possible help of the word-of-mouth advice of mostly lay acquaintances. Further, the costs of obtaining professional legal assistance are higher in the context of standards, because lawyers must engage more of their own energies in replicating the potential judgment of adjudicators. Many citizens—more than when working with rules—will simply choose to go without such assistance, at least until after crucial decisions that entail legal commitments are made.⁵⁹

Even when, often after the fact when risks have matured into harms, legal representation is seen as a practical option or necessity, the intense self-interest that warrants the costs of representation will push the citizen toward an external point of view. This is true whatever form the law's norms take, but it is, I suggest, more dramatically so when lawyers are working with the application of standards rather than the interpretation of rules. In the context of standards, lawyers themselves can hardly avoid being driven more toward a predictive standpoint, lest their assessment of the required balance diverge from that of the judiciary. After all, clients do not consult lawyers to get the *lawyer's* assessment of the competing considerations, but rather to close the gap between the client's assessment and that of officialdom, especially the judiciary. And although it is theoretically coherent to imagine subjects taking the internal point of view toward their lawyer's predictive assessment of judicial judgment, it is much more

57. See Schauer, *supra* note 31, at 145-49 (discussing such a cognitive "efficiency" argument for governance by rules).

58. See Eric A. Posner, *Standards, Rules, and Social Norms*, 21 Harv. J.L. & Pub. Pol'y 101, 113-16 (1997) (noting the danger to the value of autonomy).

59. See Kaplow, *supra* note 15, at 562-64, 569.

plausible that clients will take the predictive attitude the next step: predicting the exercise of state power.

Despite the increased costs of legal advice, the employment of standards rather than rules expands the range of legal questions for which the assistance of lawyers and, ultimately, litigation are cost-effective, at least for the relatively affluent. This drives up legal costs and increases the frequency of the circumstances that, as argued in the previous paragraph, will tend to undermine the internal point of view among the general citizenry.⁶⁰ This may serve the class interests of the legal profession, but it disservices the interests of the citizenry.⁶¹ Because of the association of the legal profession with the law, this can be expected to do more than undermine commitment to law; it will tend to create overt hostility toward it.⁶²

In the final analysis, there is little exaggeration in Hayek's observation:

The understanding that 'good fences make good neighbors', that is, that men can use their own knowledge in the pursuit of their own ends without colliding with each other only if clear boundaries can be drawn between their respective domains of free action, is the basis on which all known civilization has grown.⁶³

Using rules thus encourages citizens to take the law into account in choosing action, not only because they *need* to do so in order to achieve their goals but because they *can* do so, at least they can do so more easily than when standards are employed. And this fact can be expected to help maintain and foster the internal point of view.⁶⁴

60. Perverse as it may seem, at least until the Holmesian bad man theory of law becomes less influential among lawyers, one of the most important ways to preserve the internal point of view among the citizenry may be to reduce the frequency with which they feel compelled to seek legal representation. See *supra* notes 29-30 and accompanying text.

61. See Merrill, *supra* note 50, at 47, observing that

[g]enerally speaking, laymen tend to prefer mechanical rules, even if they seem silly or inefficient, whereas spokesmen for the legal community—including leading academics and judges—tend to prefer judgmental rules [i.e., standards]. This is as one would predict, assuming that laymen prefer private solutions to resource disputes that minimize the demand for lawyers and litigation, whereas the legal community prefers collective solutions that increase the demand.

See also Kaplow, *supra* note 15, at 620.

62. See Epstein, *supra* note 41, at 1-17, 25 (connecting public frustration with law and lawyers to increasing legal complexity, of which the uncertainty associated with standards is an important component).

63. 1 Hayek, *supra* note 7, at 107 (footnote omitted).

64. See Summers, *supra* note 23, at 156 ("Well-drawn definiteness furthers the rule of law, especially in giving addressees fair notice of the law's requirements, in facilitating ease and accuracy of application of law, and in securing like treatment of like cases. Other things equal, definiteness also tends to render an otherwise well-designed law more respectable, too.").

V. RULES VERSUS STANDARDS: THE TRANSACTIONAL CONTEXT

When we shift focus from the interactional to the transactional context, but retain the tentative assumption that all persons involved are inclined to take the internal point of view, the balance of considerations still favors rules. Conventional law and economics analysis recognizes that the clarity of entitlements affects transaction costs: the clearer the entitlement, the lower the transaction cost and the easier it is to make transfers.⁶⁵ This is good, whether one views such transfers as serving autonomous choice or as facilitating efficiency in the allocation of entitlements. Equally important from our present perspective, being better able to achieve one's goals in transactional contexts, however those goals are defined, should better reinforce citizens' commitment to law.⁶⁶

Nonetheless, it is generally understood that the use of standards might contribute to efficient allocations in certain situations. The core insight is that, in situations where consensual reallocation of entitlements to more efficient users cannot occur, due to high transaction costs or strategic bargaining behavior ("hold-outs"), then standards permit adjudicators to assign the entitlement to the most efficient user *ex post*, when details that affect the efficient allocation are more knowable, or induce parties to abandon strategic bargaining and consummate efficient transfers.⁶⁷ It is believed that the same result will accrue from a rule only if the rule fortunately, if fortuitously, assigns the entitlement *ex ante* to the party who will end up being able to make the most efficient use of it. But these suggestions represent decidedly second-order phenomena, because the conditions under which standards will work in this way are quite demanding, and there is little reason to believe that lawmakers are capable of segregating contexts in which standards will be more efficient from those generally more common situations in which they will not,⁶⁸ and little more reason to believe that law-applying officials have the competence to make efficient *ex post* choices under standards.⁶⁹ Nor is it likely that the

65. See, e.g., Robert Cooter & Thomas Ulen, *Law and Economics* 93, 97 (4th ed. 2004).

66. See generally 1 Hayek, *supra* note 7 (explaining that citizens' commitment to conceptions of justice are shaped by the evolution of abstract and predictable norms that facilitate the achievement of citizens' diverse purposes).

67. See, e.g., Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. Econ. & Org. 256 (1995) (modeling conditions under which standards will negate potential hold-out behavior by less efficient users); Merrill, *supra* note 50 (explaining the usefulness of standards in high transaction cost contexts).

68. For example, Jason Johnston conditions his result favoring standards on at least the following assumptions: (a) The potential acquirer of a right to act has incomplete information about the harm of his actions; (b) the potential efficiency gains of preventing a hold-out are large; and (c) adjudicators systematically underestimate high levels of harm to the person holding out. See Johnston, *supra* note 67, at 257-58. Note that, in order for the standard to work efficiently, lawmakers choosing a standard must either be very lucky or they must know, *inter alia*, that in the chosen context, courts systematically underestimate levels of harm and yet they (lawmakers and adjudicators) must be unwilling or unable to change *that*.

69. See Korobkin, *supra* note 33, at 38-39.

occasional efficiency gains, if any, from creating ex ante uncertainty by using standards would be worth the more pervasive impairment of the ownership clarity that is so important in providing incentives to conserve and develop resources optimally.⁷⁰

More importantly, from the present perspective, in these potentially identifiable contexts in which standards might be employed to achieve local efficiency gains, it is unlikely that the relative efficiency losses that might occur under rules because transfers do not take place will be viewed by the citizenry as an evil attributable to the law itself; instead, they will be attributed to the unusually high transaction costs or strategic bargaining. This means that the efficiency losses associated with rules pose no serious threat to the maintenance of respect for law.⁷¹ By contrast, inefficient allocations by a court that erroneously applies a standard will very likely be attributed by the affected citizens to legal failure.

These points are illustrated in the context of one particular kind of impediment to transfers that has emerged in recent work on behavioral law and economics: the endowment effect. Experimental research has shown that (at least for some people in some contexts) the lowest price at which the individual will sell an entitlement he owns is higher than the highest price at which he will purchase that same entitlement from another.⁷² With regard to the choice between rules and standards, the argument is that this supposedly irrational behavior suppresses transfers of entitlements and that the increased clarity of entitlement associated with rules increases the frequency or severity of the endowment effect.⁷³

There are substantial difficulties for this argument. It fails to distinguish between the question of whether one is assigned an entitlement (which plausibly determines the endowment effect) and the question of whether one's entitlement is defined or protected by way of a rule or a standard (which may not). Even if the choice of rule or standard affects the entitlement holder's minimum sale price and maximum purchase price, it is not clear that it affects the *difference* between the two for any given person,

70. See, e.g., Johnston, *supra* note 67, at 273 (acknowledging the countervailing importance of protecting incentives to invest in the object of the entitlement and the relevance of clarity of ownership thereto). In a parallel fashion, the importance of such incentive effects undermines the occasional arguments in favor of liability rules over property rules. See, e.g., Keith N. Hylton, *Property Rules and Liability Rules, Once Again*, 2 Rev. L. & Econ. 137 (2006), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1073&context=rle>; Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. Rev. 1719 (2004).

71. The exception would occur when some separate legal norm is the source of the high transaction costs (as, indeed, can be the case when a standard is chosen), in which case the better strategy for the law would generally be to eliminate that impediment. Of course, there may be good reasons not to let people achieve their goals (at least their immediate goals) by alienating certain of their interests. If these inalienability norms are well considered and have broad appeal, they should not undermine the internal point of view just because they are constraints.

72. See, e.g., Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. Pol. Econ. 1325 (1990).

73. See Korobkin, *supra* note 33, at 51-53.

which is what drives the endowment effect. In any event, even if the choice does affect this difference, the argument fails to the extent that transfers are valued because they effectuate autonomy rather than because they facilitate efficiency. Neither party's autonomy is impaired just because they choose not to make a transfer that would, unbeknownst to either of them, increase their joint wealth. For the same reason, the failure of such transfers should have little negative effect on citizens' inclination to take the internal point of view.

Moreover, relative to the efficiency consideration (and more indirect impacts it might have on citizens' attitudes toward law), it is important to note that the endowment effect discourages transfer only under special conditions that happen sporadically. For example, if S_a is the minimal sale price for an entitlement when held by A, and P_a is the maximum purchase price that A will pay for that entitlement, with similar definitions for B (S_b and P_b), then the endowment effect ($S_a > P_a$; $S_b > P_b$) will prevent efficient transfer from B to A (because $S_b > P_a$) when $S_a > S_b > P_a > P_b$ or $S_a > S_b > P_b > P_a$, but not when $S_a > P_a > S_b > P_b$. Even on pure efficiency grounds, attempting to eliminate such second-order, quite possibly transient,⁷⁴ endowment effects by clouding the question of entitlement impairs the ability of owners to cultivate the objects of the entitlements and plan for their use in a world of changing information.

So far in this section I have been discussing whether the problems of transfer affect the choice between rules or standards for interactional dimensions of the entitlement subject to potential transfer. A slightly different set of considerations is present when addressing instead the question of whether the legal norms governing transfer should themselves be articulated as rules or standards. Here again, the conventional result is that entitlement clarity, such as that provided by rules, reduces transfer transaction costs and thus contributes to the achievement of private purposes and the efficient allocation of entitlements.⁷⁵ And once again, this can be expected to foster the internal point of view. To be sure, even if standards control transfers, so long as such standards are waivable default rules, there is no loss of party satisfaction or efficiency in contexts where the stakes are high enough and the parties are sophisticated enough to negotiate desired adjustments in the default rules.⁷⁶ But in other contexts,

74. The endowment effect may be only temporarily an obstacle to efficient transfer, if conditions or parties shift so that the quantitative relationships change, for example, from $S_a > S_b > P_a > P_b$ to $S_a > P_a > S_b > P_b$ or (involving a third person) to $S_c > P_c > S_b > P_b$.

75. See, e.g., Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. Legal Stud. 299 (1984); Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 J. Legal Stud. 321 (1985).

76. Such default or "gap filling" provisions are in an important way quite different from the mandatory rules that are the main topic of this essay. Gap filling norms are efforts to complete the contract of the parties, and will often entail some notion of hypothetical agreement. See, e.g., Cooter & Ulen, *supra* note 65, at 211-17. If the parties are able to modify a default standard but choose not to do so, or if they choose to adopt a contractual standard to govern their relationship, it is reasonable to infer that they prefer to be governed on the matter by a standard. For a helpful analysis of some of the complexities involved for

or when transfer standards are non-waivable, standards will produce the same tendency toward predictivism and the same potential for disappointment and frustration previously discussed.⁷⁷ Promulgators of law will have a difficult task distinguishing effectively among these contexts, although the possibility of successfully doing so cannot be ruled out.

One response to this kind of critique of standards is to suggest that transacting parties will be able to insure against the increased risk of mismatch between their own assessments *ex ante* and those of officials *ex post*.⁷⁸ We may grant this, especially for sophisticated parties. But that does not mean the law should ignore the opportunity to avoid causing such insecurity. This is especially true in the present context, because relegating citizens to insuring against unpredictable legal outcomes conduces to, if not effectively endorses, the external point of view. When citizens come to see legal outcomes on known or hypothesized facts as phenomena only to be handled actuarially, like floods or automobile accidents, they lose the connection that constitutes the internal point of view; they are then engaged merely in risk management.⁷⁹

All in all, when behavioral and circumstantial realities are incorporated into a comparative analysis of rules and standards, a fairly strong case for rules emerges, warranting a default preference for rules in regulating the conduct of citizens who are inclined to take the internal point of view. In most contexts, the factors that generate this preference—the cultural gap between citizen and legal elites, expensive and risky legal redress, predictable bias of various forms—are likely more important quantitatively and qualitatively than considerations, such as differential administrative costs, that would incline lawmakers to choose standards. Such a default preference helps to remind lawmakers not to overweight the immediately pressing administrative costs of promulgating rules, or the potential *ex post* efficiency gains possible if a court acts competently and with social wealth in mind, by excessively discounting the complex web of indirect, delayed, and largely “off budget” social costs associated with standards.

contracting parties, see Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 Yale L.J. 814 (2006). In such contexts, whether or not the parties' *ex ante* confidence in courts is well placed, it is less likely that parties' frustration with the resulting uncertainty will be focused on the law than would be the case if the law imposes a standard on the parties.

77. For example, the doctrine excusing performance of contracts on grounds of “impracticability” has generated remarkable uncertainty despite efforts to predict the behavior of courts:

In spite of attempts by all of the contract scholars . . . it remains impossible to predict with accuracy how the [impracticability doctrine] will apply to a variety of relatively common cases. Both the cases and the Code commentary are full of weasel words such as “severe” shortage, “marked” increase, “basic” assumptions, and “force majeure.”

1 James J. White & Robert S. Summers, Uniform Commercial Code § 3-10 (4th ed. 1995).

78. See Kelman, *supra* note 45, at 43.

79. See Nance, *supra* note 6, at 878-79 (discussing the radical separation of social epistemology between manager and political community when a manager adopts the “law as price” model derived from Holmes's bad man theory).

VI. INDIFFERENCE, OPPORTUNISM, AND THE EXTERNAL POINT OF VIEW

Until now, we have assumed that the parties involved have taken the internal point of view, or at least were inclined to do so. Whatever the motivating psychology, we have assumed this to involve good faith effort—not always effective, of course—to comply with the legal norm, whether rule or standard, or at least to take that norm seriously as a (defeasible) reason for action. Two important issues remain to be addressed. One is to assess the impact of the existence of those who are indifferent to the law's messages, at least until they find themselves caught up in the snare of litigation or prosecution. The second concerns the problem of opportunistic behavior, which is connected to the existence of those who take the external point of view.

The first issue need not detain us for long. There will likely always be some citizens who, for want of knowledge of or interest in the applicable legal norms, pay no attention at all to such norms—whether rules or standards—in determining their conduct, at least in certain spheres.⁸⁰ If interactions among such citizens could be practically segregated, the choice between rules and standards for those interactions might fall back to the more agnostic, meta-standard framework described earlier. It is, however, generally quite difficult, if not impossible, to tailor norms to distinguish between such classes of citizens or between the contexts in which a citizen will attend to the law and those in which she will not. Complications include the fact that some such individuals take their behavioral cues from social custom that is itself shaped by other people's expectations about the law, so that individuals who pay no direct attention to the law may nonetheless be guided in their actions by it. In the end, the advantages of rules should not be neglected because of the possible existence of a class of consistently or intermittently law-ignoring citizens. Law aspires to reduce their number, and rules are more conducive to that end.

The second issue is more subtle. It has been argued that the relatively bright lines that characterize rules provide people with information about just how far they can go without incurring legal sanctions, often in defiance of the purposes underlying the rule and sometimes knowingly taking advantage of the rule's over- or under-inclusiveness.⁸¹ To some extent, this kind of opportunism is possible for both the good and the bad person, in the technical senses we have been using for these terms. While good persons take the legal rule as guidance, some may still feel entitled to "walk the

80. "Many men go on about their business with virtually no knowledge of, or attention paid to, the so-called legal rules, be those rules certain or uncertain." Jerome Frank, *Law and the Modern Mind* 35 (1936). Of course, Frank greatly exaggerates the significance of this point, first by escalating his claim to one about "most men," and then by arguing from the unstated premise that nearly *all* men ignore the law to reach the extraordinary conclusion that "uncertainty in law has little bearing on practical affairs." *Id.* Few conclusions about law are more profoundly mistaken.

81. See Kennedy, *supra* note 14, at 1695-96. The possibility of this kind of opportunism may encourage people willing to engage in it to expend resources looking for potential "victims." See Rose, *supra* note 53, at 599-601.

line" in this fashion, although they will be less concerned with the question of legal sanctions than with the terms of the rule violation of which might trigger such sanctions. On the other hand, because they accept and voluntarily cooperate in maintaining the rules, those who take the internal point of view are more likely to understand rules purposively, which presents the potential for interpreting the rule so as to violate neither its letter nor its spirit. In contrast, the person who takes the external point of view, who attends to legal rules only as signals or predictions that coercive sanctions might be applied, is more likely to ignore a purposive understanding of rules as well as any moral inhibitions about using information about legal rules (including how and when they are likely to be enforced) to fullest advantage. So the problem of opportunism is particularly acute in regard to the Holmesian bad man. The inference that can be drawn from this collection of observations is that the flexibility provided by standards can allow adjudicators to identify and sanction those people who would thus act opportunistically, thereby protecting those who encounter them in either the interactional or transactional context. This flexibility, in turn, creates risk that will help deter people from such contemplated opportunism.⁸²

There is certainly some truth in such arguments, but they mistake a tree for the forest. The tree is that small set of encounters between citizens that result in adjudication, the event that presents the opportunity for adjudicators to achieve tailored fairness and to control the opportunistic behavior described. Although, as noted above, it is likely that the use of standards increases litigation, at least when stakes are high and parties are relatively resourceful, we are still talking about a small fraction of the forest of potentially litigated events. Focusing, instead, on that large set of cases in which the parties are unlikely to seek legal advice, much less the intervention of courts, the comparative advantage assessment is entirely reversed. Citizens are more likely to be aware of and to comprehend the demands of rules, and the relative reliability of an *ex ante* assessment of a breach of duty measured by rules makes actual or threatened litigation more viable for an aggrieved party in that subset of cases where a breach has occurred; seeking legal advice and, if necessary, pursuing legal remedies, is less of a gamble than it otherwise would be perceived. In contrast, the use of standards presents the opportunity for bad people to push the envelope even further than they would under a rules regime, content in the knowledge that the ambiguity of the legal situation will continue to deter those adversely affected from seeking expensive and risky legal redress.⁸³

82. See Kennedy, *supra* note 14, at 1773-74. The complex and contingent relationship between altruism and the use of standards asserted by Kennedy is readily inferred from the observation that rules can be used to achieve altruistic objectives. *Cf.* Kelman, *supra* note 45, at 54-63.

83. Courts have sometimes recognized this phenomenon. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (holding that agreements, here among railroads, to set prices are not exempt from antitrust prosecution just because the price set is "reasonable"). The Court argued,

Of course, this is more likely to be true in those contexts—vastly the more numerous—in which the stakes are relatively small.

The likely impact of this phenomenon on the citizenry is complex, but certain broad categories of impacts deserve particular notice. In a world where legal redress is expensive and atypical, standards, more so than rules, will systematically favor the interests of the relatively powerful bad persons in their encounters with the relatively weak.⁸⁴ The former will be able to take advantage of the tailored fairness of standards when they see a benefit to be gained thereby, whereas the latter will see only vexation and expense when faced with an aggressive or intransigent bad person who pushes the envelope created by a standard's indefiniteness. Aside from (but in part because of) the injustice that this produces, this is likely to alienate the relatively weak from the legal system, which will be seen as serving the interests of the powerful, that is, even more than when rules are employed. And that will undermine the internal point of view among relatively weak citizens. They will come to see the necessity of nonlegal forms of rough corrective justice, which may entail retaliatory illegal behavior against the powerful, especially if the perpetrators thereof can be confident that these measures will remain "below the radar screen" of the law.

Repeated encounters between the comparably weak governed by standards will generate a similar erosion of the internal point of view, but for slightly different reasons. By decreasing the predictability of success of legal redress and increasing the costs of litigation, standards again place increased pressure on ordinary citizens to find modes of redress outside the law, even when opportunism is not a particular problem. At least in the context of repeat players, this can mean the development of informal norm

What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? . . . [E]ven after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate . . . that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill will of the railroad itself in all his future dealings with it. To say, therefore, that the [Sherman] act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

Id. at 331-32. Even Professor Kennedy seems to have been aware of this difficulty, though he attributed little weight to it. See Kennedy, *supra* note 14, at 1696 ("[G]eneral standards are likely to be paper tigers in practice.").

84. By "relatively powerful" and "relatively weak" I do not refer to the overall wealth and social power of individuals, but to their relative positions in a particular encounter. Thus, a small business owner who does house renovations may be "more powerful" in the context of such renovation work than the very wealthy customers whose houses are renovated. Much of the power in such contexts depends on which party is more of a repeat player in the particular context. On the other hand, this sense of relative power is probably correlated with wealth and power in a broader sense, because of the pervasive reality of customers purchasing goods or services from relatively large businesses.

systems, which may work relatively well.⁸⁵ For the less moral, or less cooperative, it can also mean increased resort to violence and other forms of retaliatory self-help. Either way, one can anticipate a citizenry that finds less confidence in its legal system, which can only undermine the internal point of view.

Against all this, the improved ability of adjudicators using standards to tailor justice and (perhaps) improve efficiency in disputes involving those who act in ignorance of the law and in disputes between comparably sophisticated parties over matters significant enough to make legal representation cost-effective seems a meager palliative. It is unlikely to have significant impact on the cultivation or maintenance of the internal point of view among the general citizenry.

Notwithstanding my general conclusion, there is one important clarification that is highlighted by the focus on opportunism. As noted above, when considering only those who take the internal point of view, the matter of sanctions is of little import. Norms that direct officials in the application of sanctions speak almost entirely to those who take the external point of view.⁸⁶ Yet the bad person can be expected to take advantage of the anticipated gap between the directive of a guidance norm (whether rule or standard) and that of an adverse judicial decision, as well as that between an adverse judicial decision and *real* enforcement, that is, when the sheriff arrives to arrest someone or to enforce a judgment lien.⁸⁷ Without sacrificing the advantages of rules in the context of guidance, standards have substantial advantages in the context of remedies and sanctions, where their flexibility can be used to take account of this calculation by the bad person—whose legitimate interest in predictability is minimal—as well as to tailor justice for the good persons who, despite their efforts, end up before the court.⁸⁸

This point is illustrated nicely in a comment by Frederick Schauer about the context dependence of the predictability advantage of rules:

[I]f the sentence of death were imposed in accordance with accessible rules strictly applied, people (including those contemplating committing capital crimes) could predict with some confidence which acts would generate the death penalty. That predictability, however, would come

85. See generally Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991) (frequently illustrating the preference of citizens for simple rules). Ellickson notes that, among the transaction costs that may drive citizens to nonlegal dispute resolution is the cost of discerning one's legal rights and duties. See, e.g., *id.* at 281.

86. On the limited but extant role of remedies in handling disputes between those who take the internal point of view, see Nance, *supra* note 6, at 909-17.

87. See, e.g., Williams, *supra* note 30, at 1279-80. These gaps will not be pertinent to the good person's decisions about how to act under the substantive legal norm, but they will be pertinent to the good person's decisions about whether to expend resources to seek legal redress against a bad person for violation of that norm, thus contributing to the ability of the bad person to take advantage of the good, regardless of the form of the guidance norm.

88. See, e.g., Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 Iowa L. Rev. 443 (2004) (arguing that uncertainty in the severity of the sanction or the probability of detection can increase deterrence).

only at the risk of putting to death some people who would live if their particular acts were scrutinized in the full richness of relevant detail. On the other hand, many rules involving the formalities of contracts, wills, trusts, and real estate transactions are premised on the assumption that the costs of a mistaken decision are comparatively minor, at least when compared to the enormous virtues of predictability, without which few contracts, wills, trusts, or real estate transactions would ever be consummated.⁸⁹

This kind of contrast might seem to concern only differences between law's attempts to suppress wrongdoing and law's attempts to facilitate desirable private transactions.⁹⁰ But equally or even more important in the comparison is the difference between right and remedy. The determination on the death sentence falls unequivocally within the remedial realm of sanctions and enforcement, and the specification of factors is primarily directed at officials rather than potential criminals, the overwhelming majority of whom will never consult these factors in anticipation of acting.⁹¹ In contrast, the formalities for validity of contracts, wills, and so forth, lie in the realm of pre-remedial rights, of widely used guidance norms directed primarily at citizens and only secondarily at reviewing officials.

When the right/remedy distinction comes into relief, the illustrations in the quoted passage support the use of standards in the remedial context. Indeed, the passage may not go far enough in that direction, for it seems to suggest (although this may not have been intended) that the person contemplating a capital crime has a legitimate interest in predictability of sanction. There is no need to balance *ex ante* predictability against *ex post* flexibility in such a context, because there is no legitimate interest in predictability. Rather, the flexibility of standards at the point of determining the sanction protects both the criminal who, on a nuanced analysis of the situation, does not deserve the death penalty and the state's ability to deter the occasional would-be criminal who attempts to "walk the line" by choosing the details of his crime so as to avoid the death penalty or who contemplates stepping over the line in reliance on the gap between substantive norm and ultimate sanction. So long as remedial standards are not set or applied in such a manner as to be incompatible with the guidance rules they support, they pose no threat to the legitimate interests in predictability held by those who accept the internal point of view.⁹²

It is indeed possible that much of the modern agnosticism or ambivalence about the choice of rules versus standards can be attributed to a failure to

89. Schauer, *supra* note 31, at 142.

90. Cf. Kennedy, *supra* note 14, at 1690-94.

91. An analogous point can often be made in regard to the guidance norms that specify duties under the criminal law, but in that context there are other concerns that take prominence, including the need to control, in a fairly visible way, the government's power to wield the criminal sanction against even law-abiding citizens.

92. "[Fairness requires only] that there is sufficient warning to one bent on obedience that he comes near the proscribed area." *Winters v. New York*, 333 U.S. 507, 539 (1948) (Frankfurter, J., dissenting).

keep clear the distinction between rights (guidance norms) and remedies (enforcement norms). This would not be surprising, because one of the implications of the Holmesian bad man theory of legal obligation is just to collapse the right/remedy distinction into one overall prediction of the exercise of state power. If we reject this distortion of legal obligation and attend to the dominant importance of guidance for the law-respecting citizen, then we can see more clearly the important role of standards in dealing with those who behave opportunistically toward guidance rules.

CONCLUSION

The development and maintenance of the internal point of view presents an important, perhaps the most important, collective action problem encountered by societies that would try to govern members' conduct by law. As Robert Summers recently stated, "Legally well-informed addressees who voluntarily implement the law may be the most important material components of any [legal] system."⁹³ This is not to deny the potentially repressive downside of a widely accepted internal point of view. A healthy legal system is not *necessarily* a just one, just as a democracy is not necessarily a just political order.⁹⁴ Among other things, a just legal system must make a reasonably good allocation between the public and private sphere, between the realm in which citizens should internalize public norms and the realm in which they are free to pursue private goals subject only to whatever nonlegal normative structures may apply. In response to those who see in a strong commitment to the internal point of view the specter of authoritarian demands, with law as an instrument of exploitation or repression,⁹⁵ it is important to emphasize that such a commitment to the internal point of view is entirely compatible with any of several different versions (on the political left or the political right) of a commitment to keeping the public sphere small. Whatever the allocation of decision making to public and private spheres, the role of citizens who take the internal point of view toward law is critical to the success of the enterprise as a whole.⁹⁶

There are, of course, many factors that affect the strength and extent of the internal point of view among the citizenry. One ought not to underestimate, however, the importance of choices about legal form. When

93. See Summers, *supra* note 23, at 284.

94. See, e.g., Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (2003).

95. See, e.g., Hasnas, *supra* note 16, at 217-19.

96. John Hasnas argues that the repressive power of the "myth of the rule of law," which he associates with the fruitless search for definite rules, can only be avoided by ending the state's monopoly over the legal system and introducing competitive provision of legal dispute resolution. *Id.* at 213-15, 220-33. It may be true that a more competitive system could generate more just legal norms, but for the reasons articulated above, it seems likely that "producers" in such a competitive system would work hard to provide definite rules and eschew vague standards, whenever that is possible. Indeed, I suspect that it is the monopoly power of the state that permits the rather luxuriant use of standards in modern law.

Lon Fuller famously defined law as the “enterprise of subjecting human conduct to the governance of rules,”⁹⁷ he clearly understood the aspirational nature of governance by rules. Much of his book, *The Morality of Law*, is devoted to the difficulties that the ordinary subject of law has in finding the clear guidance in legal norms that justifies and psychologically supports the internal point of view. What he also understood, even if he never quite said it, is that the quest for rules *as distinct from standards*, whether or not it *defines* the legal enterprise, is an important part of law’s aspiration. In a world such as ours, characterized by a cultural gap between lawmakers and citizens, expensive and risky legal redress, ubiquitous bias affecting both citizens and adjudicators, and regularly encountered “bad” persons who take the external point of view toward law’s norms, a presumption in favor of rules is warranted in the context of guidance norms in order to nurture the internal point of view. This is so because strengthening the internal point of view not only contributes to enforcement efficiency, but also cultivates a healthy sense of self-governance. Further, choosing rules over standards to achieve these goods does not pose serious threats of allocative inefficiency or opportunistic injustice; indeed, the rules are generally conducive to allocative efficiency and the prevention of opportunistic injustice.

This preference is in the nature of an advisory “rule of thumb.” Put differently, it is a principle for the creation and management of legal norms by lawmakers; it is not intended to give guidance to citizens in the conduct of their affairs, so it is not itself the kind of rule that it recommends. Further, it does not recommend just *any* rule over any standard governing the same subject. It might well be desirable, for example, to replace the general standard of negligence with a series of negligence *per se* rules. But that does not mean that this preference recommends the remarkably simple and predictable alternative rule, “no duty to avoid, or liability for, unintentional harms,” nor the somewhat more complex rule, “death by hanging for all unintentional harms.” The preference only favors rules plausibly accommodating the competing principles and interests involved. To put it differently, among the factors that count against a contemplated rule, factors that might outweigh the preference, is the fact, if it is a fact, that the contemplated rule would yield results less just or less efficient than the only available alternative, even if the latter is a standard.⁹⁸ Still, the cumulative force of the relevant long-run considerations is such that we should be quite reluctant to reject or abandon a plausible rule in favor of a standard. When we do, moreover, it is generally important to provide rule-

97. Fuller, *supra* note 7, at 96 (internal quotation marks omitted).

98. A special, but important example of this dilemma occurs when legislation creates an overbroad rule with potentially horrendous consequences and an interpreting court is forced to soften the effects by injecting a qualifier that converts the rule into what might be a standard. *See, e.g., United States v. Joint Traffic Ass’n*, 171 U.S. 505, 509 (1898) (affirming that only “direct” restraints of trade are reached by the Sherman Antitrust Act’s unqualified language prohibiting “every contract, combination, . . . or conspiracy, to restrain trade or commerce”).

based delineation of the subjects governed by rule and those governed by standard, lest the benefits of the rules be lost.⁹⁹

A final and important caveat: To argue for a preference for rules does not determine the exact nature of the interpretive methodology that judges should employ in addressing hard cases arising under rules. A preference for definiteness in legal norms obviously has general limits, the most important of which is the quite predictable infelicities of verbal communication. Like Fuller,¹⁰⁰ I would certainly not deny the important role of purpose in the interpretation of legal language. Nor would almost any intelligent layperson, at least when presented with an example of an obvious communicative failure in the drafting of the language of a rule. Citizens will expect the legal profession to clean things up to some extent, and this anticipation must be built into the guidance function of rules. Citizens who expect rules to be interpreted intelligently deserve not to be disappointed by excessive efforts to remove value judgments from the judicial craft. Yet even that seemingly minor concession poses the interpretive questions that have consumed so much of the time of legal theorists in recent years. Obviously, I have not here attempted to adjudicate among competing theories of interpretation. But to interpret rules, one must *have* rules. The preference for which I have argued is simply one that favors, in a general way, the rules end of the rules/standards spectrum.

99. See, e.g., Merrill, *supra* note 50, at 31-32 (discussing the importance of a mechanical test for determining whether a mechanical trespass rule should apply or a judgmental nuisance rule (standard) should apply).

100. See, e.g., Fuller, *supra* note 7, at 82-91, 224-32.